REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO.159 OF 2013

GALAXY REALTORS LIMITED ……..PLAINTIFF

VERSUS

KENYA FOREST SERVICE ……DEFENDANT

RULING

1. This ruling relates to two applications namely, the notice of motion dated **10th May, 2011** and filed on **11th May, 2011** and the notice of motion dated **20th September, 2011** and filed on the same day.

2. The motion dated **10th May, 2011** was brought by the plaintiff. It seeks an order of summary judgment against the defendant as sought in the plaint.

3. The application is premised on the grounds that the defendant failed and refused to file a statement of defence within the time stipulated by law; that whereas the defendant has no interest over the **Nakuru/Municipality Block 19/186,** hereinafter referred to as the (suit property) the plaintiff's interest in the suit property is unchallengeable. It is also contended that the application should, in the interest of justice be allowed as the defendant has no intention and/or interest in defending the suit.

4. The application is supported by the affidavit of one of the directors of the plaintiff, **Benjamin Keter,** where the grounds thereon are reiterated. Besides reiterating the grounds on the face of the application, he deposes that after the defendant was served with summons to enter appearance, it filed grounds of opposition to the application for interlocutory relief, which was filed simultaneously with the plaint. It however, failed to file a statement of defence. Reiterating the contention that the defendant has no intention and or interest in defending the suit, the deponent argues that the plaintiff claim qualifies for summary judgment under **Order 36** of the Civil Procedure Rules.

5. In opposing the application, the defendant through one of its officers, **Nancy Wangui Maina,** filed the replying affidavit sworn by the said officer on **12th September, 2011.** In that affidavit the defendant denies the plaintiffs claim that it has lost interest in prosecuting the suit and that the plaintiffs claim qualifies for summary judgment under **Order 36** aforementioned. Vide that replying affidavit; the defendant explains that owing to an oversight on the part of its advocates, it failed to file a statement of defence within the time stipulated in law. Maintaining that the defendant is willing and able to defend the suit, the deponent urges the court not to visit the mistake of the defendant's advocate on the defendant. Terming the plaintiff's application for summary judgment baseless and ill-conceived, the deponent contends that the issues raised in the suit are complex and as such incapable of being determined summarily. In this regard, the deponent argues that the plaintiff intends to use shortcuts in order to enrich itself from public property.

6. Urging the court not to allow the application, the deponent of the replying affidavit contends that the

plaintiff s application does not raise a *prima facie* case with probability of success to warrant the granting of the orders sought against the public interest that the defendant seeks to protect in the suit property.

7. During the pendency of the plaintiff's application, the defendant filed the notice of motion dated **20th September, 2011** seeking, among other orders, stay of further proceedings in this suit pending the hearing and determination of the application; discharge and/or variation or setting aside of the orders issued on **12th April, 2011** restraining the defendant, its agents, servants, employees officers or any other person under it from evicting, trespassing or claiming, alienating or in any other way interfering with the plaintiffs quiet and peaceful possession and occupation of the Nakuru/Municipality Block 19/186 pending the hearing and determination of the suit. The defendant also seeks leave to file and serve its defence out of time.

8. The application is premised on the grounds on its face and the supporting affidavit of the defendant's officer herein. The applicant contends that the order of the court herein was issued without full disclosure of material facts and the situation on the ground; that at the time the order was issued, both the plaintiff and the defendant were in occupation and possession of the suit property; that the defendant's proprietory interest in the suit is likely to deteriorate if the orders are enforced against it. The defendant contends that he has a good defence against the plaintiff as there is high likelihood that its title was fraudulently obtained. Further that the defendant intends to counterclaim against the plaintiff s claim.

9. Concerning the plaintiffs application for summary judgment, the defendant has reiterated its claim that the plaintiffs case is not suited for summary judgment. It is contended that it is in the interest of justice that the defendant be given a chance to defend its case as failure to file the intended defence and counterclaim was occasioned by a mistake on the part of its advocates, which should not be visited on the defendant.

10. In the affidavit sworn in support of the application, the deponent *inter alia*, contends that the defendant had put up three residential buildings on the suit property way before the suit herein was filed; that when she was transferred to Nakuru and prior to the issuance of the court orders herein, she moved into the buildings and renovated them for her own use. Further, that it was after she had moved into the suit property that she was served with a court order stating that the property belonged to the plaintiff.

11. It is contended that at the time the defendant was served with the court order herein, it was not aware that the suit property had been allocated and subsequently sold to a third party.

12. Explaining that the suit property is situated in part of Menengai Forest and that the developments effected thereon have always been used to house forest rangers, the deponent of the supporting affidavit argues that, although the plaintiff may be an innocent purchaser for value and without notice, unless the court order herein is discharged or varied it will greatly prejudice the defendant.

13. The applicant also contends that there is another suit filed in respect of the suit property, being Nairobi **HCC NO.421 of 2002.** The defendant is apprehensive that unless the order herein is discharged, varied or set aside the suit property is likely to further deteriorate. Its officers may also be persecuted by the private developers.

14. In view of the foregoing, the defendant maintains that it is in the interest of justice that the orders be reviewed to allow the defendant have some supervisory powers in the property and to maintain the residential houses therein.

15. The defendant suggests that pending the hearing and determination of the suit the parties continue having joint possession of the suit property.

16. With regard to the prayer for leave to file defence out of time, the defendant maintains that it has a good defence against the plaintiff as there is a possibility that the plaintiff's title was obtained fraudulently.

17. Terming the allocation of the suit property to a private developer a case of systematic attack on public land the defendant maintains that it is fair and just to allow the application as the prejudice, if any, that will be occasioned on the plaintiff can be compensated by way of costs.

18. The defendant's application is further supported by the affidavit of the defendant's advocate, **Caroline Rose Tabuche Ateya,** sworn on **7th October, 2011.** In that affidavit, the defendant's advocate explains the circumstances that led to the issuance of the order sought to be reviewed. In this regard she deposes that on the date the order herein was confirmed, **11th April, 2011** she had sent an advocate (Miss Nyawira) to confirm that she had filed the application to enjoin **Kipkoech Tallam** and the **Commissioner** of **Lands** to the suit (pursuant to the leave she had been granted by court to do so.

19. The defendant's advocate contends that unfortunately the court was misled to believe that the plaintiffs application for temporary injunction was unopposed when it was indeed opposed.

20. Counsel explains that on **31st August, 2011** the defendant got information from the Ministry of Environment and Lands that the land had not been excised by the time the original owner, Kipkoech Tallam (a former forest officer) purportedly acquired title to the suit property. Counsel contends that degazettement of the suit property was done on **19th October, 2011** way after the property had been wrongfully allocated to the original owner.

21. In view of the foregoing, counsel for the defendant contends that the plaintiffs title is void ab initio.

22. With regard to the orders sought to be reviewed, the defendant's advocate maintains that they were issued without full disclosure of material facts and the situation on the ground. In this regard, the defendant's counsel maintains that both the defendant and the plaintiff were in occupation of the suit property when the orders were issued.

23. Explaining that the delay in filing the defence was caused by reasons beyond the defendant's control, counsel urges the court not to condemn the defendant unheard.

24. In reply, **John Kiprop Ronoh,** one of the directors of the plaintiff, swore and filed the replying affidavit sworn on **31' October, 2011.** In that affidavit, Mr. Kiprop *inter alia,* deposes that the defendant's application is based on misinformation and misconception and as such bad in law. In that regard, the plaintiff contends that the deponent of the supporting affidavit did not obtain the authority of the defendant to respond to such crucial issues.

25. Terming the defendant's challenge on the letter of allotment to the original owner of the suit property (Kipkoech Tallam) hypocritical, the respondent argues that the defendant's contention that the letter of allotment was illegally procured is unmaintainable as the said letter of allotment was signed by the Commissioner of lands in favour of the original allotee.

26. It is the plaintiff’s case, that if the defendant's claim that the property illegally acquired was genuine, it would have directed its complaints to the office of the Commissioner of lands or any other authority charged with allotment of land.

27. The plaintiff further argues that the sale agreement dated **19th August, 2009** executed between the original owner of the suit property and the plaintiff together with the other documents produced in support of the plaintiffs case are genuine and enough to prove that the plaintiffs ownership to the suit property is genuine and that the impugned transaction was within the knowledge of the defendant.

28. The plaintiff argues that there is no evidence of any steps that the defendant's took to have the impugned title cancelled. There is also no communication from any office of any authority to support the defendant's allegations. Those facts coupled with the defendant's delay in filing a statement of defence is said to be an indication that the defendant is taking the suit lightly and that its claim is not genuine.

29. It is also contended that there is no evidence to prove that the suit property is owned, possessed and/or

controlled by the defendant. In this regard, it is contended that the copy of the map annexed to the defendant's application is neither prove that the suit property falls within a forest nor prove of possession or ownership. The map is also challenged on the grounds that it is not certified or from lands office.

30. Arguing that the defendant's claim is not supported by any law of Kenya and terming itself an innocent purchaser for value without notice, it is explained that by the time the plaintiff bought the suit property, there was no restriction, inhibition or caution against the title held by the vendor, Kipkoech Tallam.

31. The defendant is also said to be unworthy of the orders sought as it is in contempt of the order of the court it seeks to review, set aside or vary.

32. Advocates for the respective parties filed submissions which I have read and considered. From the pleadings herein and the submissions filed in respect thereof, the issues for consideration are:-

> 1. **Whether there was non disclosure and/ or misrepresentation in the proceedings leading to issuance of the orders sought to be varied or set aside?**

33. Concerning this question, it is submitted that when the plaintiff instituted this suit, it gave a list of all the documents it intended to rely on and that no document concerning the manner in which the plaintiff came into possession of the land was ever concealed. That being the case, the contention that there was non-disclosure and concealment of material facts on the part of the plaintiff is said to be false.

34. The foregoing submissions by the plaintiffs advocate should be contrasted with those of the defendant's advocate to the effect that, in its application for a temporary order of injunction hereto, the plaintiff failed to disclose to the court that the suit property was allocated to its predecessor in title before degazettement. The plaintiff is also accused of having misled the court by claiming that the application was not opposed when the defendant had filed grounds of opposition to the application.

35. Having perused the court record, I can confirm that the court was misled to deal with the matter as if it was unopposed when at that time, the defendant had filed grounds of opposition. See the grounds of opposition filed on **1st February, 2011** and the court proceedings for **17th October, 2010.** In those proceedings, counsel for the plaintiff, Mr. Kahiga informed the court:-

> **"The application is dated 17/11/2010 for temporary orders of injunction against the defendant. There has been no reply to the same. We pray for orders accordingly……. We oppose the application. They were served way back in November 2010 and they have not bothered to file any papers."**

36. The foregoing are the circumstances under which the orders sought to be reviewed, were granted.

37. In the affidavit sworn by counsel for the defendant it is explained that on the day the adverse orders were made, the advocate had sent another advocate, Miss Nyawira, to confirm to court that he had filed the application to enjoin Kipkoech Tallam and the Commissioner of lands.

38. Counsel deposes that unfortunately, the court was misled to believe that the application was unopposed. The fact that the defendant had filed grounds of opposition at the material time is said to be borne out by the court record and the plaintiffs supporting affidavit to the application dated **10th May, 2011.**

39. Although the plaintiff’s application under reference was opposed it is clear, from the foregoing cited section of the court's record that the trial judge dealt with the application, as though the same was unopposed. The reason for proceedings as such is blamable on the counsel for plaintiff, who made the court believe that the application was unopposed, when in fact it was.

Referring to the case of **Omega Enterprises** (supra) cited in **Joseph Supare Ole Sakunda & 10 others**

vs. **Harison Musau & another** (2006) eKLR and **Shah** vs. **Mbogo & Another** (1967)E.A 116, cited in **Giro Commercial Bank Ltd** vs. **Jasvinder Singh Dhadialla** (2005) eKLR, counsel submits that the defendant has made up a case for setting aside the *ex parte* orders hereto.

In Omega Enterprises *(supra),* the Court of Appeal observed:-

> **"It is perfectly well settled that a person who makes an ex parte application to court-that is to say in the absence of the person who will be affected by that which the court is asked to do, is under an obligation to the court to make the fullest possible disclosure of all the material facts within his knowledge, and if he does not make the fullest possible disclosure, then he cannot obtain advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by him."**

While in **Shah** vs. **Mbogo & Another,** it held:-

> **"Principles of setting aside *ex parte* judgments or orders are well settled. The court exercises its judicial discretion in favour of setting aside an order to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error but will not assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice."**

40. In applying the foregoing principles to the circumstances of this case, the question to answer is whether the defendant has made up a case for exercise of the court's discretion in its favour.

41. In determining this question, I wish to reiterate that there is evidence that the trial judge was misled by counsel for the plaintiff to believe that the plaintiffs application for interim order was unopposed when, in fact it was. I also wish to point out that the allegation that the houses therein were at the material time occupied by the defendant's staff have not been denied or controverted.

42. In view of the foregoing and without going to the merits of the case, I hold the view that if the trial court was notified that the application was opposed and of the defendant's claim over it, it may not have made the orders it did. This notwithstanding, the determination as to whether the defendant has made up a case for issuance of the orders sought will depend on the outcome of the plaintiff s application for summary judgment which I will consider shortly.

43. As pointed out herein above, the plaintiff's application for summary judgment is premised on the grounds that the defendant failed and/or refused to file a statement of defence within the time stipulated by law; that whereas the defendant has no interest over the suit property, the plaintiffs interest in it is unchallengeable and that the defendant has no intention and/or interest in defending the suit.

44. With regard to the last two grounds, through the affidavits sworn on behalf of the defendant's case, it is clear that the defendant had and still has an interest in the suit property.

In the case of **Abok James Odera T/A A. Odera & Associates v. John Macharia & Co. Advocates 12013) eKLR** the Court of Appeal had this to say about an application for summary judgment:-

> **"Case law has crystallized the parameters within which a relief of summary Judgment can either be granted or with held. In the case of *Osodo versus Barclays Bank International Limited (1981) KLR 30* it was held *inter alia* that:-**
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> ***"Where there are triable issues raised in an application for summary judgment, there is no room for discretion and the court must grant leave to defend unconditionality"*. In the case of *Magunga General Stores versus Pepco Distributors Limited (1987) 2KAR 89* ,the Court of Appeal held inter alia that**
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> ***"An appellate court will not interfere with a trial Judges' exercise of his/her discretion on an***

application for summary Judgment unless the exercise was wrong in principle or that the Judge acted wrongly on the facts."

See also the case of *Nairobi Golf Hotels (Kenya) Limited Civil Appeal No. 5 of 1997 (UR)* wherein the Court of Appeal made observations that

"it is now trite that in applications for summary judgment under order XXXV rule 1 of the Civil Procedure Rules, the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. His duty is however limited to showing prima facie the existence of bona fide triable issue or that he has an arguable case. On the other hand it follow a plaintiff who is able to show that a defence raised by a defendant in an action falling within the provision of order XXXV is shallows or a sham is entitled to summary judgment".

Lastly, the case of *City Printing Works Kenya Limited versus Baclly (1977) KLR85* wherein the predecessor of this court, the Court of Appeal for Eastern Africa made observations *inter alia* at page 86 that:-

> ***in an application for summary Judgment, the court weighs the balance of probability carefully as well as taking into account the bonafides of the parties in particular in a case where the plaintiffs claim is for a liquidated demand supported by documentary evidence..."* At page 87 the court went *on:-"the general rule is that leave to defend should be given unconditionally unless there is good ground for thinking that forward are no more than a them and it must be more than mere suspicious..."* Further that: - *a defendant may successfully revisit an application if he can satisfy the master that he has a good defence to action on the merit"***

45. In the instant case, although the plaintiffs acquired the suit property from its original owner at a time when there was no restriction, prohibition or caution restricting dealings in the suit property, in view of the defendant's claim that the suit property was allocated to the original owner at a time when it was not available for allocation (before it was degazetted for that purpose), I hold the view that the defendant's deserves an opportunity to be heard on those issues. As for the delay in filing a statement of defence, I hold the view that the circumstances that led to the delay have been properly explained. See the defendant's advocate's sworn on 7th **October, 2011.**

46. Having found the plaintiffs application for summary judgment to be unsustainable and in view of my finding that the *ex parte* orders hereto were made without full disclosure of material facts concerning the suit property, I am persuaded that the defendant has made up a case for variation of those orders.

47. As the allegation by the defendant that its officers were in occupation of the suit property when the orders sought to be varied were issued have not been controverted, I find and hold that the defendant has made a case for issuance of the orders sought in prayer three of its application dated **20th September, 2011.** However, given the peculiar circumstances of this case, I will allow that prayer to the extent that the defendant and/or its agents, servants and/or employees are allowed to continue use and occupation of the buildings erected thereon. The plaintiff is allowed to continue using the rest of the suit property but restrained from effecting permanent developments thereon pending the hearing and determination of the suit.

48. Having found that the defendant's proposed defence raises triable issue(s) namely, whether or not the defendant acquired good title to the suit property, I also allow prayer 4 of the defendant's application herein.

49. The plaintiffs application for summary judgment is denied. Each party to bear its own costs in respect of the applications herein.

Dated, signed and delivered in open court at Nakuru this 10th day of September 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Kipkoech holding brief for Mr Aim for Defendants N/A for the defendants

Emmanuel Maelo : Court Assistant

L N WAITHAKA JUDGE